

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**F.H., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
CUSTOMS & BORDER PROTECTION,  
Honolulu, HI, Employer**

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**Docket No. 17-0312  
Issued: June 12, 2017**

*Appearances:*

*Coby Jones, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 25, 2016 appellant, through his representative, filed a timely appeal from a June 3, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated April 20, 2017 the Board denied the request for oral argument as the issue on appeal could be fully addressed on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0312 (issued April 20, 2017).

## **ISSUE**

The issue is whether appellant has more than two percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

On appeal appellant contends that he should have received a schedule award for five percent permanent impairment of his right upper extremity based on range of motion (ROM) findings.

## **FACTUAL HISTORY**

On August 16, 1993 appellant, then a 37-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 25, 1993 he sustained an injury to his right wrist when, while lifting a tray of magazines. His wrist went numb which caused him to hit his wrist on the bottom of a case. OWCP accepted appellant's claim for right wrist synovial cyst (ganglion). Appellant underwent right wrist ganglion cyst removals on January 6, 2000 and August 21, 2001, and right wrist dorsal ganglion cyst removals on June 3, 2010 and June 26, 2013. He received brief periods of intermittent wage-loss benefits on the supplemental rolls from August 21 to September 4, 2001, and from July 8 to July 17, 2013.

On October 29, 2014 appellant filed a claim for a schedule award (Form CA-7).

By letter dated January 13, 2015, OWCP referred appellant to Dr. Alice M. Martinson, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a February 11, 2015 medical report, Dr. Martinson diagnosed appellant with ganglion cyst, right wrist, resolved after multiple surgeries. She noted that appellant had full ROM in both wrists and in all of the small joints of the digits of both hands, that sensation was normal throughout both hands, and that grip strength with a Jamar dynamometer was 20/22/20 on the dominant right side and 40/38/38 on the left. Dr. Martinson concluded that, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>4</sup> appellant had two percent permanent impairment of the right upper extremity. In an attached worksheet, she indicated that pursuant to Table 15-3 of the A.M.A., *Guides* appellant had a wrist mass or ganglion cyst, class 1, grade C, for two percent regional impairment.

By letter to Dr. Martinson dated February 24, 2015, OWCP's medical adviser advised that it was necessary that Dr. Martinson provide input regarding grade modifiers for physical examination and functional history. He noted that there were no clinical studies relevant to the accepted condition of right wrist ganglion.

In a March 28, 2015 response, Dr. Martinson indicated that her February 11, 2015 report revealed that appellant had complaints of persistent wrist pain and inability to grip and twist with his dominant right wrist. She also noted that appellant had 50 percent measurable loss of grip strength in the dominant hand. Dr. Martinson "declined" to alter the two percent permanent impairment rating.

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<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

In an April 5, 2015 report, OWCP's medical adviser noted that pursuant to Table 15-3 of the A.M.A., *Guides*, the accepted condition of right wrist ganglion cyst ranged from one percent to three percent, with the default value of two percent. He noted that in the February 11, 2015 report, Dr. Martinson indicated that appellant reported no functional history, so the grade modifier for functional history would be 0. OWCP's medical adviser noted that Dr. Martinson did report grip strength measurements for the right and left upper extremities, and that right grip strength was 50 percent of the grip of the left upper extremity, so appellant had a grade modifier of 1 for physical examination. He noted no adjustment could be used for clinical studies. Using the net adjustment formula, OWCP's medical adviser found a negative 1 adjustment, which indicated grade B impairment, for two percent permanent impairment rating of the right arm.

By decision dated May 4, 2015, OWCP issued a schedule award for two percent permanent impairment of the right arm.

On June 2, 2015 appellant requested a hearing before an OWCP hearing representative. At the hearing, held on January 14, 2016, he testified that he had chronic pain in his right hand. Appellant also noted that he had swelling and tingling sensation from his right wrist up his arm. The hearing representative stated that although he believed that the schedule award was consistent with the ganglion cyst charts of the A.M.A., *Guides*, appellant also had degenerative arthritic joint issues that resulted from the injury.

In a report dated January 27, 2016, Dr. M. Stephen Wilson, an orthopedic surgeon, indicated that appellant had sustained a significant injury to his right hand/wrist due to an employment-related accident. He opined that appellant sustained five percent permanent impairment to the right hand/wrist due to chronic recurrent wrist pain and weakness noted throughout ROM. Due to loss of ROM, Dr. Wilson opined that, pursuant to section 15-7 of the A.M.A., *Guides*, motion impairment would be used as a standalone rating. He further indicated that, pursuant to Table 15-32 of the A.M.A., *Guides*, which discussed rating wrist ROM, flexion of 50 degrees equaled three percent upper extremity impairment, extension to 70 degrees equaled zero percent upper extremity impairment, radial deviation to 20 degrees equaled two percent upper extremity impairment, and ulnar deviation to 30 degrees equaled zero percent upper extremity impairment. Referencing Table 15-35, ROM grade modifiers, Dr. Wilson noted that appellant's five percent upper extremity impairment was consistent with grade modifier 1. Referencing Table 15-7 of the A.M.A., *Guides*, he noted that appellant's pain disability questionnaire was consistent with a grade modifier of 3. As appellant's functional history grade was two grades lower than the grade modifier of 1, as compared to his ROM grade 3 assigned to motion deficit, Dr. Wilson determined that no modification was necessary. He opined that this resulted in five percent permanent impairment of the right upper extremity. Appellant's representative concluded that appellant should therefore be awarded an additional three percent permanent disability to the right upper extremity due to loss of ROM.

By decision dated March 15, 2016, the hearing representative set aside the prior decisions and remanded the case to OWCP's medical adviser for further review. She determined that OWCP's medical adviser should utilize the A.M.A., *Guides* and evaluate impairment using the ROM method based on measurements provided by Dr. Wilson. The hearing representative indicated that after any further necessary development, OWCP should issue a *de novo* decision.

On March 18, 2016 OWCP referred the case to OWCP's medical adviser, as instructed by the hearing representative. In a March 29, 2016 reply, OWCP's medical adviser concluded that Dr. Wilson incorrectly utilized the ROM calculation in determining that appellant had five percent impairment of the right upper extremity. He noted that pursuant to the A.M.A., *Guides*, ROM was primarily used as a physical examination adjustment factor and only to determine actual impairment values in the rare case when it is not possible to otherwise define impairments.<sup>5</sup> The medical adviser opined that in this case the diagnosis-based impairment method (DBI) should be utilized and that, pursuant to Table 15-3 of the A.M.A., *Guides*, appellant's wrist mass or ganglion mass yielded a class 1 impairment, with a default value of two percent. He then found grade modifiers of 1 for functional history, 1 for physical examination, and 1 for clinical studies adjustment. The medical adviser indicated that the net adjustment was zero, and that therefore appellant had two percent permanent impairment of the right upper extremity and not the five percent permanent impairment suggested by Dr. Wilson.

By decision dated June 3, 2016, OWCP denied appellant's claim for a greater schedule award as it determined that the evidence of record was insufficient to establish that appellant sustained more than two percent permanent impairment of the right upper extremity.

### **LEGAL PRECEDENT**

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.<sup>6</sup> Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.<sup>7</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>8</sup>

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

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<sup>5</sup> A.M.A., *Guides* 387, Section 15.2.

<sup>6</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>7</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

<sup>8</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>9</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>10</sup>

### **ANALYSIS**

The issue on appeal is whether appellant has more than two percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>11</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>12</sup> In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology.

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the June 3, 2016 decision. OWCP shall utilize a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, undertake such other development as may be deemed necessary, and shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

### **CONCLUSION**

The Board finds this case not in posture for decision.

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<sup>9</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>10</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>11</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>12</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 3, 2016 is set aside and the case is remanded for further action consistent with this decision.

Issued: June 12, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board